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In The

Supreme Court of the United States

No. 73-1750

PITT COUNTY TRANSPORTATION COMPANY,
Petitioner,

v.

CAROLINA FREIGHT CARRIERS CORPORATION,
FOR THE USE AND BENEFIT OF
LIBERTY MUTUAL INSURANCE COMPANY
AND
OLD REPUBLIC INSURANCE COMPANY,
Respondents.

BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

In accordance with Rule 40 of the Revised Rules of the Supreme Court of the United States the respondent, hereinafter referred to as Carolina, accepts the petitioner's, hereinafter referred to as Pitt, statements as to opinions below, jurisdiction, statutes and regulations involved and the statement of facts. Carolina will, however, attempt to refine what it considers to be the basic question involved in this case.

QUESTION PRESENTED

Carolina believes that the issue of this case can be more simply stated and would refine that issue to the following statement:

1. Does Pitt owe a duty to indemnify Carolina under the provisions of the lease as set out in full in Replacement Appendix F?

This is the basic issue as stated by both of the courts below. See Appendices A and B, pages 2A and 12A.

ARGUMENT

The Fourth Circuit's opinion in this case is so clear and to the point that we wish to adopt it as the primary part of our argument. It will be found in Appendix A, pages 1A to 9A.

It is apparent from a reading of Pitt's Petition for a Writ of Certiorari that it has missed the point of the Fourth Circuit's opinion (*Carolina Freight Carriers Corporation* v. *Pitt County Transportation Company,* 492 F.2d 243 (4th Cir. 1974)) and has misinterpreted both the lease agreement, set out in full in Replacement Appendix F and United States Code Requirements and ICC Regulation Requirements set out in Appendix G.

There is no indication in this case in fact or otherwise that Carolina or Liberty Mutual Insurance Company, Carolina's insurer, violated the terms of either the lease, the Federal statutes or the regulations. To the contrary, all of the evidence is that Carolina conformed to every requirement. The lease itself provides in its very first paragraph on the first page as follows:

> "Carolina Freight Carriers Corporation, lessee, hereby acknowledges receipt of and leases from Pitt County Trucking Company, lessor, of Farmville, North Caro-

> lina 919-SK3-3109 *for its exclusive possession, control, and use, and assumes complete responsibility in respect thereto for the duration of this Motor Vehicle Trip Lease Agreement,* the following vehicular equipment to be used by said lessee beginning at 1 PM o'clock on 6/19/69 in its interstate service to transport merchandise." (Emphasis provided.) Replacement Appendix F, page 1.

The body of the agreement reiterates the above statement in paragraph 5 of the terms and conditions of the lease. Replacement Appendix F, page 3.

In fact, in this particular case two suits were brought in the United States District Court for the Eastern District of Virginia, Richmond Division, against Carolina and the driver of the vehicle, Pugh. Those suits were defended by Liberty Mutual Insurance Company as the insurer of Carolina and were ultimately compromised, settled and paid by Liberty Mutual.

Nowhere does the record indicate that either Carolina or Liberty Mutual violated any of the requirements of the Federal statutes or regulations.

Whose Agent Was Pugh, The Driver Of The Vehicle?

Pitt in its brief has devoted a large part of its argument to this question. Pitt contends that Pugh is Carolina's statutory agent.

It is perfectly obvious that Pugh would have had to have been on the business of Carolina at the time the accident occurred. Otherwise, Liberty Mutual and Carolina would not have been obligated to defend him and to settle the cases brought against him on his behalf. However, there is also not any question that Pugh was the employee of Pitt. The lease agreement says he was. See paragraphs 9, 10 and 12 of the lease agreement. Replacement Appendix F, pages 5A and 6A.

It seems apparent, then, that Pugh was the agent of both Carolina and Pitt but for different purposes. As to the public Pugh was on the business of Carolina at the time of the accident and, therefore, Carolina and its liability carrier were liable to third parties for Pitt's negligence. This result is obviously what was intended by both the Federal statutes and the regulations set out in Appendix G. But as between Carolina and Pitt, Pugh remains Pitt's employee. In point of fact he has never been anything else. The regulations themselves contemplate this situation by making certain requirements in the situation where "any person other than a regular employee of the authorized carrier is assigned to drive equipment." § 1057.4(e), Appendix G, pages 33A and 34A.

It is important to note that neither the Federal statutes nor the regulations say what Pitt apparently wishes they would say—that is, that indemnity agreements between carriers are not permitted. If that had been intended it could have been very succinctly stated in the regulations.

It should be further noted that even if the regulations did provide specifically that indemnity contracts as between lessor and lessee would be of no effect and were void, the effect might have been to nullify the most important reason for the regulations. Such a regulation could have effectively removed a financially responsible defendant from liability to an innocent third party.

This conflict is pointed out by one of the cases cited by Pitt in its brief. *Simmons* v. *King,* 478 F.2d 857 (5th Cir. 1973). In that case a party named Dubose was the lessee and occupied the same position that Carolina does in this case. A party named Ace was the lessor and occupied the same position as Pitt does in this case. A person named King was the driver and was the employee of Ace. At page 867 of the opinion the 5th Circuit made the following statement:

"Although Dubose is liable for King's acts as a matter of law, Ace could still be likewise liable under applicable common (civil) Louisiana standards of control. This is not as incongruous as might be supposed. ICC can mandate a positive legal responsibility which we uphold and the only way it would be meaningful—to give protection to the injured member of the public. At the same time Ace has, or may have, a practical control over King of a kind which would not allow it to obtain an automatic insulation from liability from the mere terms of a lease between two parties."

Are The Indemnity Provisions Of The Lease Otherwise Valid?

As has been pointed out before both the 5th Circuit in *Allstate Insurance Company* v. *Alterman Transport Lines, Inc.*, 465 F.2d 710 (5th Cir. 1972) and the 4th Circuit in *Carolina Freight Carriers Corporation* v. *Pitt County Transportation Company, supra,* have stated that they find no conflict at all between the language of the Federal regulations and the indemnity agreement. Two freely contracting parties, according to these rulings, have a perfect right to determine as between themselves where a loss should fall under certain circumstances.

Pitt does not contend that the lease agreement does not provide for indemnity under these circumstances. Pitt also agrees that under the specific provisions of the lease agreement, North Carolina Law is to apply. See paragraph 18 of the lease agreement, Replacement Appendix F, page 7. Pitt has already cited in its Petition for a Writ of Certiorari the controlling North Carolina cases and we do not feel it necessary to burden this brief with a restatement of those cases. Suffice it to say that North Carolina Law supports the validity of the indemnification agreement.

CONCLUSION

Carolina respectfully submits that this Court should not grant a Writ of Certiorari in this case. The underlying Fourth Circuit opinion as set out in Appendix A very clearly distinguishes the *Alford*[1] case and requires no further clarification by this Court.

As far as we can see, there is no uncertainty in this area as between the rulings of the circuits. It is true that the *Alford* case, *supra,* may have assumed a violation of the regulations which in fact did not exist, but the Carolina Freight case decided by the Fourth Circuit as the underlying decision in this matter certainly very clearly delineates the differences between violation of the Federal regulations and the enforcement of the indemnity agreement.

Carolina respectfully urges the Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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[1] *Alford* v. *Major,* 470 F.2d 132 (7th Cir. 1972) *affirming,* 314 F.Supp. 979 (N.D. Ind. 1970).

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing brief were mailed, postage prepaid, to Alexander H. Slaughter, Esquire, McGuire, Woods & Battle, 1400 Ross Building, Richmond, Virginia 23219, counsel for petitioner and three copies were mailed, postage prepaid, to J. W. Morris, III, Esquire, Browder, Russell, Little & Morris, 1510 Ross Building, Richmond, Virginia 23219, counsel for respondent, on or before September 20, 1974.

I further certify that I am a member of the Bar of the Supreme Court of the United States and that all parties required by law to be served have been served.

Edward A. Marks, Jr.
Of Counsel for Respondent